IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Babu Khan vs. Jassa & ors.

S.B. Civil Second Appeal No.16/1981 against the judgment and decree dated 21.11.1980 passed by the Civil Judge, Jalore in Civil Appeal No.1/79.

Date of Judgment: December 07 , 2005.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. M.C. Bhoot for the appellant.
Mr. M.R. Mehta,for the respondents.

BY THE COURT:

This second appeal is against the judgment and decree dated 21.11.1080 passed by the Civil Judge, Jalore in Civil Appeal No.1/79 by which the appeal of the landlords-plaintiffs was allowed by the first appellate court for eviction of the tenant-defendant present appellant.

Brief facts of the case are that the plaintiffs filed a suit for eviction of their tenants on the ground of personal bonafide necessity and default in payment of rent. The suit was filed on 18.3.1968. The plaintiffs' suit was decreed by the trial court by judgment and decree dated 12.3.1970. The defendants preferred appeal against the judgment and decree of the trial court which was allowed by the first appellate

court vide judgment and decree dated 5.7.1971 and the decree so far as eviction of the tenants is concerned, was set aside. The plaintiffs preferred Second Appeal No.535/1971 against the judgment and decree dated 5.7.1971 of the appellate court. It appears that an application for amendment of the plaint was submitted by the plaintiffs on 2.9.1976 with the allegations that during the pendency of the appeal before the High Court, the defendants had made certain material alterations in the suit premises. The application for amendment of the plaint was opposed by the tenants-defendants but by the order of this Court dated 24.10.1977, the application for amendment of the plaint was allowed and the mater was remanded to the trial court for afresh decision on merit. The amended plaint was taken on record, of which the defendants submitted written statement. Thereafter, evidence of both the parties were recorded by the trial court and the trial court vide judgment and decree dated 12.4.1979 dismissed the suit of the plaintiff after deciding issue of material alteration in the suit premises against the plaintiffs. The plaintiff being aggrieved against the judgment and decree dated 12.4.1979, preferred first appeal which was allowed by the first appellate court vide impugned judgment dated 21.11.1980. Hence this second appeal.

The plaintiff's allegations in the plaint so far as material

alteration is concerned, are that the defendants, about 2-1/2 months ago removed one "*padwa*" and one "*dhalia*" and took away the iron-roof of those "*padwa*" and one "*dhalia*". The defendants also removed water-tap. In addition to above, the defendants after removing one *"Olia"*, constructed one room of stones which is of permanent nature and put the temporary roof over the said room. The defendants also removed stone-slabs of 6 ft., 32 in number and put 5 ft. Stone-slabs and raised 6ft. Stone-slabs. The defendants also removed 2-3 stone-slabs from the eastern side of the property and opened a door. The defendants submitted written statement and denied the plaint allegations with specific plea that all *"padwa"* etc. are in the same condition in which they were when the defendants took the property on rent. He denied removal of *"dhalia"* and submitted that so far the iron-roof is concerned, that was taken away by the plaintiffs. Therefore, the defendants put iron-roof. The defendants specifically submitted that the "*olia*" is in the same condition as it was before and he has not opened any door by removing stone-slabs. Therefore, the defendants have not materially altered the plaintiff's premises. The trial court observed that even if any change was made by the defendant, then that change is not a material alteration in the premises and the plaintiff when found that it will be difficult for him to get the decree on the ground of personal bonafide necessity and default in payment of rent, he submitted

application for amendment and got the application allowed. Whereas the first appellate court after considering the evidence, held that the defendants after removing *"olia"*, constructed a kitchen of stones which is an structure of permanent character and the defendants also removed one "*padwa"* and one "*dhalia"*. It is also held by the first appellate court that the defendants constructed two"*padwas"* and also removed two stone-slabs and opened a new door and, therefore, the premises has been materially altered by the defendants.

According to the learned counsel for the appellant, in fact no change was made by the defendants in the suit premises and from the evidence of the plaintiffs as well as from the evidence of the defendants, it is clear that there are minor changes only and those changes cannot constitute material alteration in the premises. According to the learned counsel for the appellant, the plaintiff himself admitted in his evidence that there was "*padwa"* when the suit property was let out and in his statement, the plaintiff admitted that *"padwa"* was there, may be of stone-walls. According to the learned counsel for the appellant, the plaintiff admitted in his statement that whatever change has been made, was made three years before the filing of the suit, therefore, the case of the plaintiff is totally false and the plaintiff finding it difficult to get the decree on the ground of personal bonafide

necessity and default in payment of rent, amended the plaint. The learned counsel for the appellant relied upon the judgments of the Hon'ble Apex Court delivered in the cases of Om Prakash v. Amar Singh and another (AIR 198 SC 617) and Brijendra Nath Bhargava and another vs. Harsh Wardhan and others ((1988) 1 SCC 454), wherein the Hon'ble Apex Court considered- what are the material alterations in premises which may give right to the landlord to obtain a decree for eviction of his tenant. According to the learned counsel for the appellant, minor changes in the rented premises for beneficial use, removal of tin-shed and temporary construction without affecting the form, nature and character of the property, are not material alterations in the rented premises, therefore, the first appellate court committed serious error of law in drawing inference about the material alteration in the suit premises. The learned counsel for the appellant also referred the statements of the plaintiffs and the defendant in support of his plea that the structural change if found proved, do not constitute material alteration in the suit premises.

The learned counsel for the respondents supported the judgment of the first appellate court.

Following substantial questions of law were framed by this Court

while admitting the second appeal on 18.2.1981:-

> "(1) Whether the replacement of 'kacha' structures by pacca construction by the appellant does not amount to material alteration?
>
> (2) Whether the defendant tenant had constructed further kacha structures, which had also caused material alteration entitling the plaintiff to obtain a decree for eviction ?"

I considered the submissions of the learned counsel for the parties and perused the record as well as evidence of the parties. It will be worthwhile to mention here that this Court in second appeal, allowed the amendment application of the plaintiff and permitted the plaintiff to take a plea of eviction against the defendants on the basis of allegation of material alteration in the suit premises during pendency of the second appeal. The contention of the learned counsel for the appellant that the plaintiff admitted that the changes have been made much prior to filing of the suit by the defendant deserves to be rejected because of the simple reason that it was never the case of not only the plaintiff but even of the defendant that the plaintiff or defendant raised construction of permanent character at any point of time after defendant's entering into the premises as tenant and before the suit was filed. The defendant's stand in the written statement which was originally filed when the ground of material alteration was not there in

the plaint, was that the plaintiff assured the defendant that the plaintiff will construct the house and will let out it to the defendant. It was never the case of the defendant that the plaintiff in furtherance to that assurance raised construction of any room etc. Not only this but when the ground of material alteration was taken by the plaintiff after seeking permission of the court and by amending the plaint, the defendants submitted fresh written statement and very specifically pleaded that the defendants did not remove the “padwa” and further specifically admitted that the said “padwa” is in existence till today as it was earlier. Therefore, the statement of the plaintiff read by the learned counsel for the appellant is read out of context which is clear from the complete reading of the plaintiff's statement recorded on 15.1.1978. In the statement dated 15.11.1978, the plaintiff Bhika , in his examination-in-chief, in last stated that the changes were made about 2-3/4 – 3 years ago from today (i.e. From 15.11.1978). The amended application before this Court in Second Appeal No.535/1971 was submitted on 2.9.1976, therefore, the statement of the plaintiff is in consonance with the plea which he took in his plaint if read with the facts mentioned in the application dated 2.9.1976 because the application was filed certainly after the plaintiff found material alteration in the suit premises. Not only this but in cross-examination, the plaintiff stated that he submitted the suit on the ground of material

alteration about 6-7 months ago and alterations were made about three years ago, which obviously from the date of filing of the amended suit.

The plaintiff's case is that the defendants removed the temporary structure and constructed a room and the defendant's plea in the written statement is that he did not remove the temporary structure. The first appellate court on the application of the respondent-present appellant himself and with the consent of both the parties decided to inspect the site by order dated 31.10.1980 and the court inspected the site on 1.11.1980. The first appellate court gave opportunity to both the parties to submit objections against the court's site inspection report but on 3.11.1980 both the parties stated in court that they have no objection about the site inspection report prepared by the court. The site inspection report was considered as corroborative piece of evidence only and the first appellate court, after considering the statements of not only the plaintiffs but statements of defendants witness Raheem Bux, held that one room of stone was constructed by the defendants. This finding of fact is based on the evidence of the plaintiff and his witnesses and this finding is also based upon the evidence of the defendant's own witness who belied the case of the defendant that the old 'kacha' structure is only on the site. These facts are narrated only to show that the finding of fact has been recorded by

the first appellate court on the basis of the evidence about raising of the construction by the defendants and this Court framed substantial question of law to the effect that Whether the replacement of 'kacha' structures by pacca construction amounts to material alteration or not. In the facts of this case, it was not open for the appellant to assail the finding of the fact recorded by the first appellate court about appellant-defendant's raising pucca construction and, therefore, this Court rightly framed substantial question no.1 to the effect Whether the replacement of 'kacha' structure by pacca construction by the appellant does not amount to material alteration?.

Whether the construction which was raised by the defendants amounts to material alteration in the plaintiff's premises or not is required to be examined in the light of the decision relied upon by the learned counsel for the appellant in the case of Brijendra Nath Bhargava's case (supra). In that case the alleged alteration was construction of wooden 'dochatti' and balcony. The said wooden structure was built on beams and planks inside the show-room itself. That was not treated as material alteration by the Hon'ble Apex Court. Hon'ble the Apex Court held that what is material alteration in the rented premises will have to be decided on the basis of facts and circumstances appearing in each case but the material consideration

would be whether the construction carried out by the tenant alters the front show or structure of the premises. Hon'ble the Apex Court in the said judgment also considered the the earlier judgment of the Supreme Court delivered in the case of Om Prakash (supra). The Hon'ble Apex Court even specifically considered the issue which is the substantial question of law in this appeal as in the case of Om Prakash(supra), wherein it was observed that the High Court observed that the fact that construction is permanent or temporary in nature, does not affect the question as to whether the construction materially alters the accommodation or not. The Hon'ble Apex Court held that we do not agree with this view and held that the nature of construction, whether they are permanent or temporary is a relevant consideration in determining the question of material alteration. A permanent construction tends to make changes in the accommodation on a permanent basis, while a temporary construction is on temporary basis which do not ordinarily affect the form or structure of the building, as it can easily be removed without causing any damage to the building. Therefore, replacing 'kacha' structure by 'pucca' construction clearly amounts to material alteration. This proposition applies more when the property let out to the tenant itself consists of only 'kacha' structure because by replacing entire 'kacha' structure and raising 'pucca' construction, the entire nature, form and character of the property

stands altered. Nothing remains original. The tenant took the premises knowing well that the landlord has let out huts to him and he has to live in the huts. The tenant, therefore, has no right to claim that he will live in a 'pucca' house against the wish of the landlord. In this case, the appellant failed to establish that they have any right to remove temporary structure and construct permanent room made of stones. The learned counsel for the appellants also tried to submit that the room has not been constructed by digging foundation and the plaintiff has not pleaded and proved that the room was constructed by digging foundation. Such a plea is not available to the appellant at this belated stage because of the simple reason that it was never the case set up by the appellant-defendant that the structure has been raised without digging foundation, otherwise also in the present case, the material alteration in the suit premises stands fully proved by removal of the 'kacha' hut itself and raising a 'pucca' room.

In view of the above discussion, there is no merit in this appeal and the appeal of the appellant is dismissed.

(PRAKASH TATIA),J.

mlt.